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No. 90-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SOUTHERN LIFE AND HEALTH INSURANCE COMPANY and RICHARD PERRY,

Petitioners,

v.

LUCY R. TURNER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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QUESTION PRESENTED

Whether the $499,000 punitive damage award imposed against petitioners violates the Due Process Clause of the Fourteenth Amendment because it is grossly disproportionate to the $1,000 actual injury and because neither the trial court nor the Supreme Court of Alabama applied that State's standards for scrutinizing punitive damage awards to constrain in a constitutionally meaningful fashion the jury's exercise of broad punitive discretion in this case.

STATEMENT OF INTERESTED PARTIES

All parties to this case in the court below are listed in the caption. Pursuant to Rule 29.1 of the Rules of this Court, the parent company of petitioner Southern Life and Health Insurance Company is Honor Capital Corp.; Southern Life has no non-wholly owned subsidiaries.

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No. 90-

SOUTHERN LIFE AND HEALTH INSURANCE COMPANY
and RICHARD PERRY,

Petitioners,

v.

LUCY R. TURNER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

Southern Life and Health Insurance Company ("Southern Life") and Richard Perry respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Alabama affirming a $499,000 punitive damage award imposed upon them by the trial court. In upholding the punishment, the court below did not apply "the detailed substantive standards it has developed for evaluating punitive awards," *Pacific Mutual Life Insurance Co.* v. *Haslip*, No. 89-1279 (Mar. 4, 1991), slip op., at 17, or otherwise engage in any analysis of the size of the punitive damage award.

OPINIONS AND ORDERS BELOW

The September 21, 1990 opinion of the Supreme Court of Alabama affirming the judgment of the trial

court is reported at 571 So. 2d 1015 and reproduced in App. A, *infra*, 1a-13a. That court's December 7, 1990 order denying petitioners' Application for Rehearing is unreported and reproduced in App. B, *infra*, 14a-15a. The trial court's May 24, 1989 order denying petitioners' Motion for a New Trial and for Judgment Notwithstanding the Verdict, conditioned upon respondent's acceptance of a remittitur of $4,500,000 of the jury's $5,000,000 verdict, is unreported and reproduced in App. C, *infra*, 16a-21a.

JURISDICTION

Petitioners articulated their federal constitutional objections to punitive damages at every stage of the proceedings in the Alabama courts. *See infra* pages 5-6. The Supreme Court of Alabama issued its opinion implicitly rejecting those arguments on September 21, 1990 and that court denied petitioners' Application for Rehearing on December 7, 1990. This petition is being filed within ninety days of the denial of rehearing. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment provides, in pertinent part:

> "[N]or shall any State deprive any person of . . . property, without due process of law . . . ."

STATEMENT OF THE CASE

A. Statement of the Facts

In 1985, respondent purchased from Southern Life a $1,500 life insurance policy that insured the life of

her aunt and named respondent as beneficiary. According to respondent, "she paid the premiums that were due on . . . the policy . . . until the month that [the insured] died, October 1986." App. A, 2a, 571 So. 2d, at 1016. When her aunt died, respondent did not file a claim with Southern Life. Instead, she notified Mr. Perry, the agent responsible for collecting respondent's premiums, that "she wished to file a claim on the . . . policy." *Id.*, at 3a, 571 So. 2d, at 1016.[1]

When respondent subsequently contacted Southern Life's district office in March 1987, she was told that Southern Life "had no record of the . . . policy or the claim." App. A, 3a, 571 So. 2d, at 1016. Shortly thereafter, Mr. Perry allegedly informed respondent that he and his supervisor "had agreed to pay [respondent] $500 a month for three months to satisfy her claim," and, in May 1987, Mr. Perry allegedly made an initial payment of $500 to respondent. *Id.*, at 3a, 571 So. 2d, at 1017.

On June 8, 1987, before Mr. Perry could pay the other two $500 "installments" and before Southern Life could address respondent's inquiries regarding the policy, *see infra* note 7, respondent brought this action alleging, *inter alia*, that Southern Life and Mr. Perry had committed fraud by failing to pay to

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[1] Respondent's testimony was "in sharp conflict on almost every material fact" with the testimony of Mr. Perry. App. A, 2a, 571 So. 2d, at 1016. Thus, Mr. Perry testified that respondent "was frequently late with premium payments and sometimes skipped them altogether," and that he informed respondent that he could not file a claim for respondent because the policy had lapsed. *Id.*

respondent the full $1,500 death benefits under the policy.[2]

The jury returned a $5,000,000 verdict against Southern Life and Mr. Perry, $4,999,000 of which was punitive.[3] The trial court found that the jury's verdict was excessive, *see infra* note 7, and also concluded that "the size of the verdict may have been affected by bias, prejudice or emotions" due to a "vitriolic outburst of one of plaintiff's attorneys" that "shocked and surprised" the trial court. App. C, 18a-19a. However, the trial court denied petitioners' post-trial motions, conditioned upon respondent's acceptance of a $4,500,000 remittitur. *Id.*, at 19a. Respondent accepted the remittitur,[4] and petitioners appealed.

On September 21, 1990, the Supreme Court of Alabama issued its opinion affirming the trial court's $499,000 punitive damage judgment. That court denied petitioners' Application for Rehearing on December 7, 1990. On January 10, 1991, Justice Kennedy

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[2] Respondent's complaint also contained allegations of breach of contract, conversion, conspiracy, negligence and "wantonness," but "only the fraud count was submitted to the jury." App. A, 4a n.3, 571 So. 2d, at 1017 n.3.

[3] The jury's verdict did not differentiate between punitive and compensatory damages, but the trial court instructed the jury that it could award compensatory damages of no more than $1,000. *See* App. H, *infra*, 49a. Petitioners' assumption in the trial court and in the Supreme Court of Alabama that only $1,000 of the general verdict was compensatory was not disputed by respondent, and petitioners therefore proceed under the same assumption in this Court.

[4] Pursuant to Alabama procedure, respondent reserved her right to seek reinstatement of the entire verdict in the event petitioners appealed to the Supreme Court of Alabama.

granted petitioners' application, A-514, for a stay of the judgment of the Supreme Court of Alabama.

B. Presentation of the Federal Question to the Alabama Courts

Neither the trial court nor the Supreme Court of Alabama explicitly addressed petitioners' Due Process Clause challenges to punitive damages. However, petitioners expressly raised their federal due process objections to the imposition of punitive damages in this case at every stage of the proceedings in the courts below in full compliance with all pertinent Alabama procedural requirements.

In their Answer to the Amended Complaint, petitioners asserted that the standards for imposing punitive damages in Alabama are unduly vague, leading to punishment that is arbitrary, excessive and not "rationally related to legitimate government interests" in violation of the Due Process Clause of the Fourteenth Amendment. App. D, *infra*, 23a, 25a. In addition, petitioners maintained that, because "punitive damages are penal in nature," they were entitled as a matter of federal constitutional right "to the same procedural safeguards accorded to criminal defendants." *Id.*, at 23a. Petitioners reiterated these arguments in their post-trial motions. *See* App. E, *infra*, 28a-32a.[5]

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[5] By raising their federal constitutional challenges "in the pleading stage" and reasserting them post-trial and on appeal, petitioners fully complied with the Alabama procedural requirements for raising such claims. *See Alabama Power Co.* v. *Capps*, 519 So. 2d 1328, 1330 (Ala.) (challenges to constitutionality of punitive damages must be raised prior to trial), *appeal dism'd*, 486 U.S. 1002 (1988).

In the Supreme Court of Alabama, petitioners contended, *inter alia*, that the Alabama punitive damage system violates due process because it lacks "sufficient standards to govern the jury in awarding and affixing the amount of punitive damages," App. F, *infra*, at 38a, and because that system does not afford adequate procedural safeguards to punitive damage defendants. *Id*, at 45a. Petitioners also argued that the $499,000 punitive damage award was so disproportionate and excessive that it violated the Due Process Clause. *Id.*, at 42a-43a. Petitioners reasserted these due process objections in their Application for Rehearing. App. G, *infra*, 46a-48a.

Based upon the foregoing, there can be no doubt that petitioners fully and adequately presented their federal constitutional claims to the Alabama courts. Accordingly, this Court has jurisdiction to review the question presented in the petition.

REASONS FOR GRANTING THE WRIT

As this Court observed in *Pacific Mutual Life Insurance Co.* v. *Haslip*, "unlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities." Slip op., at 15. In *Pacific Mutual*, the Court concluded that the petitioner in that case "had the benefit of the full panoply of Alabama's procedural protections" (*id.*, at 19) relating to punitive damages and therefore held that the award at issue did not violate the Due Process Clause of the Fourteenth Amendment. However, in this case the Alabama courts failed to apply the post-judgment review standards that this Court in *Pa-*

cific Mutual concluded were necessary to establish "a sufficiently definite and meaningful constraint on the discretion of Alabama fact finders in awarding punitive damages" for purposes of the Due Process Clause. *Id.*, at 18. The result is an arbitrary and capricious punishment that is "grossly out of proportion to the severity of the offense," has no "understandable relationship to compensatory damages" (*id.*, at 18-19) or to the "goals of deterrence and retribution" (*id.*, at 18), and therefore violates the Due Process Clause as interpreted in *Pacific Mutual*. This petition should be granted, the judgment should be vacated and the case returned to the Alabama Supreme Court for reconsideration in light of *Pacific Mutual*.

A. The Petition Should Be Granted Because the Alabama Courts Did Not Adhere to Alabama's Procedures for Reviewing Punitive Damage Verdicts

"This Court and individual Justices thereof on a number of occasions in recent years have expressed doubts about the constitutionality of certain punitive damages." *Pacific Mutual*, slip op., at 5. In *Pacific Mutual*, the Court rejected the argument that "the common-law method for assessing punitive damages is so inherently unfair as to deny due process and be *per se* unconstitutional," *id.*, at 14, but reiterated its "concern about punitive damages that 'run wild' " and made clear that in some cases the Due Process Clause will render a punitive damage award "constitutionally unacceptable." *Id.*, at 15. This is such a case.

This Court's conclusion that the punitive damage award in *Pacific Mutual* did not violate due process was predicated in substantial part upon the Court's

determination that the Alabama courts had in that case fully and adequately applied that State's post-verdict procedures for reviewing punitive damage awards. Indeed, the Court declared that the Alabama Supreme Court's unique and "detailed" mode of appellate review of punitive verdicts "distinguishes Alabama's system from the Vermont and Mississippi schemes about which Justices expressed concern in *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, [109 S. Ct. 2909 (1989)], and in *Bankers Life and Casualty Co.* v. *Crenshaw*, 486 U.S. 71 (1988)." Slip op., at 17 n.10.

In reviewing the constitutionality of the award in *Pacific Mutual*, the Court observed that the trial court conducted "a post-verdict hearing" that conformed with the standards set forth in the Alabama Supreme Court's decision in *Hammond* v. *City of Gadsden*, 493 So. 2d 1374 (Ala. 1986), and that "Pacific Mutual also received the benefit of appropriate review by the Supreme Court of Alabama. It applied the *Hammond* standards and approved the verdict thereunder. It brought to bear all relevant factors recited in [*Green Oil Co.* v.] *Hornsby*[, 539 So. 2d 218 (Ala. 1989)]." *Pacific Mutual*, slip op., at 19-20.

This case presents a completely different picture. Neither the trial court nor the Supreme Court of Alabama adhered to the *Hammond* and *Hornsby* cases cited by this Court in *Pacific Mutual* as an important and constitutionally necessary check on the discretion of juries to inflict punitive damages. The *Hammond* case permits the trial court to consider factors such as "the culpability of the defendant's conduct," "the desirability of discouraging others from similar conduct," the "impact upon the parties," and the "im-

pact on innocent third parties," 493 So. 2d, at 1379, and requires the trial court to "reflect in the record the reasons for interfering with a jury verdict," on grounds of excessiveness. 493 So. 2d, at 1379. In *Hornsby*, "the Supreme Court of Alabama . . . elaborated and refined the *Hammond* criteria for determining whether a punitive award is reasonably related to the goals of deterrence and retribution." *Pacific Mutual*, slip op., at 18. *Hornsby* announced that the following factors could be taken into account to determine whether a punitive damage award was excessive or inadequate:

> "(1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the actual or likely harm is slight, the damages should be relatively small. If grievous, the damages should be much greater.
>
> "(2) The degree of reprehensibility of the defendant's conduct should be considered. The duration of this conduct, the degree of the defendant's awareness of any hazard which his conduct has caused or is likely to cause, and any concealment or 'cover-up' of that hazard, and the existence and frequency of similar past conduct should all be relevant in determining this degree of reprehensibility.
>
> "(3) If the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and should be in excess of the profit, so that the defendant recognizes a loss.

> "(4) The financial position of the defendant would be relevant.
>
> "(5) All the costs of litigation should be included, so as to encourage plaintiffs to bring wrongdoers to trial.
>
> "(6) If criminal sanctions have been imposed on the defendant for his conduct, this should be taken into account in mitigation of the punitive damages award.
>
> "(7) If there have been other civil actions against the same defendant, based on the same conduct, this should be taken into account in mitigation of the punitive damages award."

539 So. 2d, at 223-24 (quoting *Aetna Life Insurance Co.* v. *Lavoie*, 505 So. 2d 1050, 1062 (Ala. 1987) (Houston, J., concurring)).

In this case, the trial court did not refer to the *Hammond* or *Hornsby* factors, but rather reviewed the award pursuant to precisely the same subjective criteria as the jury: "the enormity of the wrong, the culpability of the wrongdoers, and the necessity for preventing similar wrongs in the future."[6] App. C,

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[6] The trial court's only guidance to the jury regarding the calculation of punitive damages in this case was the suggestion that it exercise its "sound discretion" to punish and deter, "keeping in mind three things. The enormity of the wrong, the culpability of the wrongdoer, and the necessity for preventing similar wrongs by that wrongdoer or others similarly situated in the future." App. H, *infra*, 50a. "Guidance like this is scarcely better than no guidance at all," *Browning-Ferris*, 109 S. Ct., at 2924 (Brennan, J., concurring), and, in fact, is mere "platitude." *Pacific Mutual*, slip op., at 14 (Scalia, J., concurring in

19a. The trial court thus fulfilled the role of a second jury when it redetermined the appropriate punishment for petitioners.

Although it found the jury's $4,999,000 punishment to be excessive, the trial court did not offer any explanation for how the substitute punishment it chose to inflict fulfilled in a rational and measured fashion the State's avowed objectives of retribution and deterrence.[7] In fact, even respondent agrees that the trial court's infliction of a $499,000 punishment "de-

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the judgment). Such instructions "encourage inconsistent and unpredictable results by inviting juries to rely on private beliefs and predilections. Juries are permitted to target unpopular defendants, penalize unorthodox or controversial views, and redistribute wealth. Multimillion dollar losses are inflicted on a whim." *Pacific Mutual*, slip op., at 1 (O'Connor, J., dissenting). Unless post-judgment review includes other sufficiently definite and "meaningful constraints," *Pacific Mutual*, slip op., at 17, a punitive damage award produced by the Alabama system cannot survive due processs scrutiny.

[7] The trial court based its conclusion that the award was excessive on the likelihood that "bias and prejudice" may have tainted the jury's verdict, App. C, 19a, as well as certain "mitigating" factors, including the fact that when respondent "confronted" Mr. Perry with allegations that he "stole insurance premiums and caused the policy to lapse," Mr. Perry "paid to plaintiff $500 of the $1,500 death benefit . . . , and agreed to pay the $1,000 balance in monthly installments . . . ." *Id.*, at 18a. Furthermore, the trial court observed, respondent admitted that she believed that Mr. Perry was "*acting in good faith* . . . and would have paid the $1,000 balance" had respondent not filed suit before he had a chance to do so. *Id.* (emphasis added). Finally, the trial court stated that, "[w]ith respect to . . . Southern Life, suit was filed shortly after it was given notice" of respondent's complaints regarding Mr. Perry's conduct, "and that fact tends to mitigate . . . Southern Life's culpability." *Id.* The trial court did not, however, explain why a $499,000

fies any logical nexus to the aims of . . . punishing and deterring misconduct," Br. of Appellee at 40 (Ala., filed Dec. 18, 1989), and, indeed, it "could, as well, have been almost any other amount." *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 276 n.3 (1984) (Powell, J., dissenting).

Although petitioners argued to the Supreme Court of Alabama that "[t]here is no reference" in the trial court's "*Hammond*" order to the *Hornsby* factors, and that when the *Hornsby* factors are considered "the remitted damage award of $500,000 is clearly excessive," App. F, 36a, 38a, the Supreme Court of Alabama did not engage in any apparent analysis of the appropriateness or the size of the award. Instead, it affirmed the punitive damage award based solely upon its determination that there was a "scintilla" of evidence to permit the jury to punish Mr. Perry and to infer that Southern Life had somehow "ratified" Mr. Perry's alleged misconduct for purposes of imputing liability to Southern Life under the doctrine of *respondeat superior*. App. A, 8a, 571 So. 2d, at 1019.[8]

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punitive damage award was justified in light of these "mitigating" facts.

[8] Although the trial court instructed the jury that it must find "clear and convincing" evidence of fraud and "malicious, oppressive or gross" conduct to support punitive damages in this case, the trial court and the Supreme Court of Alabama reviewed the jury's verdict in this case under the so-called "scintilla rule," *see* App. A, 4a, 571 So. 2d, at 1017, an extremely deferential standard that has been abolished by statute for actions filed after June 11, 1987. *Ala Code* § 12-21-12 (Supp. 1990). Because respondent filed this action on June 8, 1987, the "scintilla rule" applied to this case and the jury's verdict had to be upheld if there was a "mere gleam," a "glimmer," a "spark," the "least

The court below did not "undertake[ ] a comparative analysis," and its opinion is bereft of even a single reference to "the detailed substantive standards" cited by this Court in *Pacific Mutual* as an important "additional check on the jury's or trial court's discretion." Slip op., at 17. Furthermore, although a "verdict returned by a biased or prejudiced jury no doubt violates due process," *Pacific Mutual*, slip op., at 3 (Kennedy, J., concurring in the judgment); *see also Browning-Ferris*, 109 S. Ct., at 2921, the court below wholly ignored petitioners' arguments (App. F, 36a) that the trial court's conclusion that "bias and prejudice" infected the jury's deliberations required a new trial, or at least a further reduction of the punishment. Thus, while the *Hammond* standards and the *Hornsby* factors may "have real effect when applied by the Alabama Supreme Court," *id.*, at 19, they had no discernible effect in this case.

Accordingly, the petition should be granted. At the very least, petitioners are entitled to have the $499,000 punishment in this case expressly scrutinized pursuant to the "objective criteria"[9] that this Court assumed in *Pacific Mutual* would be faithfully applied by the court below in upholding the punitive damage award in that case.

B. The Question Whether the Punitive Damage Award Imposed in This Case Is Constitutionally Excessive Is Important and Worthy of Review

In *Pacific Mutual*, the Court recognized that the award in that case, which was only "4 times the

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particle," or the "smallest trace" of evidence to support a finding of liability. *See State Security Life Insurance Co.* v. *Henson*, 262 So. 2d 745, 747 (Ala. 1972).

[9] *Pacific Mutual*, slip op., at 20.

amount of compensatory damages" and "did not lack objective criteria," was "close to the line . . . of constitutional impropriety." Slip op., at 20. The $499,000 punishment in this case "cross[es] the line." *Id.* It is *499* times larger than the $1,000 compensatory damage award and vastly exceeds legislatively established criminal punishments for the same or similar conduct. *See, e.g., Ala. Code* §§ 13A-4-3, 13A-5-12, 13A-9-41 (1982).

"[E]ven where a statute sets a range of possible civil damages . . . the Due Process Clause forbids damages awards that are 'grossly excessive.' " *Browning-Ferris*, 109 S. Ct., at 2924 (Brennan, J., concurring) (quoting *Waters-Pierce Oil Co.* v. *Texas*, 212 U.S. 86, 111 (1909)). And "the extreme amount of an award compared to the actual damage inflicted can be some evidence of bias and prejudice in an appropriate case." *Pacific Mutual*, slip op., at 3 (Kennedy, J., concurring in the judgment). In this case, the punitive damage award was imposed "without the benefit of a legislature's deliberation and guidance" (*Browning-Ferris*, 109 S. Ct., at 2924 (Brennan, J., concurring)), it was infected with bias and prejudice and upheld on the basis of a mere "scintilla" of evidence. But it was not subject to meaningful and objective post-verdict review to ensure that it was not "grossly out of proportion to the severity of the offense" and that it had "some understandable relationship to compensatory damages." *Pacific Mutual*, slip op., at 18-19. The question whether the punitive damage award in this case is so grossly excessive as to violate due process is substantial and worthy of review.

CONCLUSION

In *Pacific Mutual*, this Court held that the Due Process Clause of the Fourteenth Amendment may render a punitive damage award "constitutionally unacceptable," slip op. at 15, and, for the first time, scrutinized a punitive damage award to determine whether it comported with due process. Petitioners in this case are entitled to have the $499,000 punitive damage award imposed upon them subjected to the same scrutiny. Petitioners recognize that the misapplication of a constitutional rule announced by this Court, even one that, as here, produces a palpably unconstitutional judgment, does not necessarily warrant plenary review. This petition, however, directly tests the confidence in the Alabama courts that this Court so recently relied upon in sustaining the award in *Pacific Mutual*. If the Alabama procedures that form the bedrock of *Pacific Mutual* are to be taken seriously by this Court, then the Alabama courts must be instructed with equal seriousness that those procedures must be followed scrupulously and must yield constitutionally reasonable and fair judgments. The petition should therefore be granted and the case either set for plenary consideration or vacated and remanded to the court below for further proceedings in light of the Court's decision in *Pacific Mutual*.

March 7, 1991

Respectfully submitted,

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APPENDICES

APPENDIX A
SUPREME COURT OF ALABAMA
SPECIAL TERM, 1990

SEP 21 1990
88-1289

Southern Life and Health Insurance Company and Richard Perry

v.

Lucy R. Turner

Appeal from Macon Circuit Court
(CV-87-90)

HORNSBY, CHIEF JUSTICE.

This appeal is from a judgment entered in favor of Lucy R. Turner and against Southern Life and Health Insurance Company ("Southern") and Richard Perry for $500,000 in a fraud action. Southern and Perry argue that the judgment should be reversed because, they say, Turner failed to present sufficient evidence of fraud, and Southern argues that Turner failed to present evidence that it ratified the actions of Perry.

In January 1986, Perry was hired by Southern as a salesman. His duties included servicing a "debit route," wherein he traveled from house to house on a weekly basis to collect premiums from Southern's policyholders. Turner was one of the policyholders on Perry's route. In 1985 she had purchased a $1,500 life insurance policy on her aunt, Lucy Barrow, who was living with her at that time, naming herself as the beneficiary. We will refer to that policy as the Turner/Barrow policy. Southern had previously is-

sued a policy on Barrow's life with a face value of $1,000, with Grace Banks, Barrow's daughter, as the beneficiary. That policy will be referred to as the Banks/Barrow policy. Turner paid the premiums on both of those policies at all times relevant to this action.

The testimony of Turner and that of Perry were in sharp conflict on almost every material fact regarding the course of their dealings. According to Turner's version of the facts, she paid the premiums that were due on both the Turner/Barrow policy and the Banks/Barrow policy on time up until the month that Barrow died, October 1986. She stated that, as far as she knew, those policies were in force at that time and had never lapsed. Turner stated that Perry never told her that the premium payments were behind or indicated that her policy was in danger of lapsing. That testimony was substantially corroborated by Turner's son, Alvin. Jonas Bowen, the Southern agent in charge of the debit route before Perry, testified that Turner had always made her payments on time when he was servicing the debit route. Bowen also testified that it was Southern's practice to assign to the debit agent the responsibility of notifying the owners of policies with face values of less than $10,000 when their policies lapsed.

Perry testified that Turner was frequently late with premium payments and sometimes skipped them altogether. He stated that, eventually, both the Turner/Barrow policy and the Banks/Barrow policy had lapsed and were in danger of being terminated. Perry stated that he made Turner aware of the status of those policies and recommended that she apply all of the overage[1] that had accumulated

[1] "Overage" is the term Southern and Perry used to denominate funds paid by a policyholder who was attempting to become current on delinquent premium payments. Those funds would be held by the agent and set aside until the balance equalled the full amount owed on the policy. At that time it would be applied to the policy, which would then be considered back in force.

on both of the policies to the Banks/Barrow policy. According to Perry, he did not know that Turner was not the beneficiary of the Banks/Barrow policy. Perry testified that Turner agreed to his suggestion. Perry then applied the overage to the Banks/Barrow policy, but continued to collect premiums on both it and the Turner/Barrow policy.

After Barrow died, Turner told Perry that she wished to file a claim on the Turner/Barrow policy. According to Turner's testimony, Perry came by her home in November 1986 and gathered all of the documents in Turner's possession that related to that policy. She said that those documents included a premium receipt card, the only evidence held by Turner that showed that she had made her premium payments. Perry testified that he did not take any documents relating to the Turner/Barrow policy from Turner's home and that he told Turner that he could not file a claim on the policy because it had lapsed.

Turner further testified that for months she heard nothing regarding the status of her claim. In March 1987, Turner went to Southern's district office in Opelika and inquired about her claim. At that meeting she was told that Southern had no record of the Turner/Barrow policy or of her claim. According to Turner, Perry came to her home the following month and explained the reason for the delay. She testified that Perry told her that Southern did not have $1,500 to pay her claim, but that he and his "boss man" had agreed to pay Turner $500 a month for three months to satisfy her claim. The following month, according to Turner, Perry came to her home and gave her an envelope containing $500 in $20 bills and asked her if she was "satisfied." Turner's testimony concerning that visit by Perry, and the payment of $500, was corroborated by Alvin Turner and by Miller Epharim, a family friend. Both men testified that they were present when

Perry paid the $500, and both testified that they counted the money.[2]

Turner testified that the following day she and Epharim went to the office of the Alabama Insurance Department in Montgomery. At that office, Turner said, she told Michael DeBellas of the Consumer Protection Division about her problems with Perry and Southern and showed him the envelope containing $500. She said that DeBellas told her he would look into her complaint, but that his investigation was dropped when DeBellas learned that Turner had retained a lawyer and filed an action against Perry and Southern.[3] This testimony was corroborated by DeBellas and Epharim.

Perry denied offering to pay Turner $1,500 in installments and denied giving her $500 in May 1987.

Southern and Perry argue that they were entitled to a judgment notwithstanding the verdict on the grounds that Turner did not present sufficient evidence of each of the elements of fraud. Turner's complaint was filed on June 8, 1987, and was therefore subject to the "scintilla rule." Ala. Code 1975, § 12-21-12 (Supp. 1989).

The elements of fraud are: (1) a misrepresentation (2) of a material fact (3) that was relied upon by the plaintiff, (4) who was damaged as a proximate result of the misrepresentation. *Earnest v. Pritchett-Moore, Inc.*, 401 So. 2d 752, 754 (Ala. 1981). The elements of fraud based on the suppression of material facts are: (1) a duty to disclose facts; (2) concealment or non-disclosure of material facts by the defendant; (3) inducement of the plaintiff to act;

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[2] Miller Epharim died before the trial began. His testimony had been procured by deposition some months before his death.

[3] Turner's original complaint contained allegations of breach of contract, conversion, and fraud. However, only the fraud count was submitted to the jury.

and (4) action by the plaintiff to his injury. *Gary v. Kirkland*, 514 So. 2d 970, 972 (Ala. 1987).

The trial judge presented Turner's claim to the jury with the following instruction:

> "[I]n order to make the defendant, Southern Life and Health Insurance Company liable for any misconduct of Richard Perry, the plaintiff has to reasonably satisfy you from the evidence . . . that Southern Life and Health, either authorized the wrongful conduct of Richard Perry, constituting the fraud, or if they didn't authorize it in advance, they must have ratified it after he did it. Ratification consisting of, number one, having knowledge of what he did, and with knowledge of what he did, they must have approved it, adopted it as their own, and accepted the benefits of it. And, without proving those things, Southern Life and Health Insurance Company cannot be held liable for the wrongful conduct of Richard Perry, even if you find he acted wrongly and committed the legal fraud."

Under that instruction, the jury could have properly returned a verdict against Southern only if it found that Perry's conduct was either authorized or ratified by Southern. There was evidence to support such findings. Under the instructions given to the jury, the trial court's denial of Southern's motion for J.N.O.V. was not error.

However, the instruction did not allow the jury to consider the theory of respondeat superior, which Turner requested the court to present to the jury. Under respondeat superior, a principal can be liable in tort for its agent's acts that are done within the scope of employment, either real or apparent, even though the principal did not authorize such acts or even expressly forbade them. No evidence of authorization or ratification is needed. That theory has been extended to cases where the fraud was committed

for the agent's own benefit and to the principal's detriment. *Pacific Mutual Life Ins. Co. v. Haslip*, 553 So. 2d 537 (Ala. 1989), cert. granted, ___ U.S. ___, 110 S. Ct. 1780 (1990); *Lawler Mobile Homes, Inc. v. Tarver*, 492 So. 2d 297, 305 (Ala. 1986); *Joyner v. AAA Cooper Transportation*, 447 So. 2d 364, 365 (Ala. 1985).

Pursuant to Rule 50(d), A.R.Civ.P., the plaintiff has properly raised the issue of whether she was entitled to an instruction on the law of respondeat superior. We agree that such an instruction should have been given to the jury in this case. We note that had the jury returned a verdict on respondeat superior based on the evidence before us, that verdict would have been amply supported by the evidence.

In light of the fact that the relationship between agency and respondeat superior is often confused, we do believe that a comment on that relationship is appropriate. The distinction between the law of agency and the law of respondeat superior is subtle.

> "The general rule that a principal is liable for the torts of his agent is not grounded on agency principles. This is evident from the holdings that a principal may be held for his agent's tort committed in the course and scope of the agent's employment even though the principal does not authorize, ratify, participate in, or know of, such misconduct, or even if he forbade or disapproved of the act complained of. Fundamentally, there is no distinction to be drawn between the liability of a principal for the tortious act of his agent and the liability of an employer or master for the tortious act of his employee or servant. In both cases, the tort liability is based on the employer and employee, rather than any agency, principle; the liability for the tortious act of the employee is grounded upon the maxim of 'res-

> pondeat superior' and is to be determined by considering, from a factual standpoint, the question whether the tortious act was done while the employee, whether agent or servant, was acting within the scope of his employment."

3 Am. Jur. 2d *Agency* § 280 at 783 (1986).

Alabama follows the rule stated in Am. Jur. 2d. In *Autrey v. Blue Cross & Blue Shield of Alabama*, 481 So. 2d 345 (Ala. 1985), the Court stated:

> " ' "The liability of a corporation for the torts of its employees, whether agent or servant, is grounded upon the principle of 'respondeat superior,' not the principles of agency. The factual question to be determined is whether or not the act complained of was done, either by agent or servant, while acting within the line and scope of his employment. The corporation or principal may be liable in tort for the acts of its servants or agents done within the scope of employment, real or apparent, even though it did not authorize or ratify such acts or even expressly forbade them." ' (Citations omitted.)" ' "

Id. at 347-48 (citing *National States Insurance Co. v. Jones*, 393 So. 2d 1361, 1376 (Ala. 1980) and quoting from *Old Southern Life Insurance Co. v. McConnell*, 52 Ala. App. 589, 594, 296 So. 2d 183, 186 (1974)). Based on the foregoing analysis, the Court in *Autrey* found that there was sufficient evidence to raise a factual issue that warranted reversing a summary judgment on the issue of whether a representative of the defendant insurance company was acting within the scope of his employment when he represented to the insurance applicant the effective date of coverage. See also, *Craft v. United States*, 542 F.2d 1250, 1254-55 (5th Cir. 1976); *Scott v. Great Atlantic & Pacific Tea Co.*, 338 F.2d 661 (5th Cir. 1964); *Pacific Mutual Life Ins. Co. v. Haslip*, 553 So. 2d 537, 541-42 (Ala. 1989),

cert. granted, ___ U.S. ___, 110 S. Ct. 1780 (1990); *AVCO Corp. v. Richardson*, 285 Ala. 538, 541-42, 234 So. 2d 556, 559-60 (1970); *Perfection Mattress & Spring Co. v. Windham*, 236 Ala. 239, 182 So. 6 (1938); *Hardeman v. Williams*, 150 Ala. 415, 418-21, 43 So. 726 (1907).

The above authorities make it clear that, under circumstances analogous to those in the present case, the actual basis of a principal's liability turns on the doctrine of respondeat superior. It follows that the rule that a principal may be held liable for the acts of his agent by ratifying them is a subpart of the broader rule of respondeat superior, which imputes liability to a principal (employer) for acts of an agent (employee) performed within the scope of the agent's (employee's) employment. In effect, the instruction given by the trial court on ratification required the plaintiff to meet a more stringent requirement of proof—proof of ratification rather than proof of action within the scope of employment. Further, in the context of the facts of this case, a scintilla of evidence sufficient to raise the issue of ratification also serves equally well, or better, to raise the issue as to whether Perry's action was within the scope of his employment by Southern. Because we find that there was a scintilla of evidence tending to show Southern's knowledge of or ratification of Perry's fraud, the trial court's error in failing to charge on respondeat superior was harmless, because the plaintiff was able to meet the heavier burden and the defendants were obviously not prejudiced. *Holloway v. Robertson*, 500 So. 2d 1056 (Ala. 1986).

A motion for J.N.O.V. must be denied if there is a scintilla of evidence in support of the plaintiff's claims. *Gadsden Paper & Supply Co. v. Washburn*, 554 So. 2d 983 (Ala. 1989). In the *Gadsden Paper* case, this Court stated:

> "A motion for J.N.O.V. is really just a reassertion of the motion for directed verdict. It is

necessary to the success of a motion for J.N.O.V. that the moving party be entitled to a directed verdict at the close of the evidence. *Wilson v. Draper*, 406 So. 2d 429, 432 (Ala.Civ.App.1981). Moreover, if the nonmoving party has produced so much as a scintilla of evidence, then the motion for directed verdict or J.N.O.V. must be denied. *Marion v. Hall*, 429 So. 2d 937, 943 (Ala. 1983).

"In *Elrod v. Ford*, 489 So.2d 534, 537 (Ala. 1986), this Court stated the following rules:

> " 'To be entitled to either directed verdict or J.N.O.V., Defendant must have proved to the trial judge that, from the evidence before the court at the time each motion was made, there was "a complete absence of proof on a material issue or [that there were] no controverted questions of fact on which reasonable people could differ," and that Defendant was entitled to judgment as a matter of law. *Deaton, Inc. v. Burroughs*, 456 So. 2d 771, 773 (Ala. 1984). Stated conversely, the motions for directed verdict and J.N.O.V. should not have been granted if reasonable inferences in favor of Plaintiffs' claims could have been drawn from the evidence or if there was any conflict in the evidence for resolution by a jury. *O'Donohue v. Citizens Bank*, 350 So. 2d 1049 (Ala.Civ.App.1977)." ' "

In his *Hammond* order,[4] the trial judge stated:

"In most civil fraud cases there is a 'gray area' as to the commission of the alleged fraud; e.g., the necessity for the jury to interpret the meaning of the words or conduct of the person accused of the fraud, or to determine whether plaintiff's

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[4] See *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986).

> reliance was reasonable. In this case the factual issue of the commission of the fraud was simple and clear; either defendant Perry did it or he didn't. This presented a simple and unambiguous question of fact for the jury, and the jury found for the plaintiff. Whether defendant Southern Life authorized or ratified its agent's conduct was not so simple a question, but the jury was charged on this point and again decided in favor of plaintiff. While the evidence which would make defendant Southern Life liable was not as clear or as abundant as that implicating the agent, *there was nevertheless sufficient evidence to support a verdict against defendant Southern Life.*"

(Emphasis supplied.)

We agree with this conclusion by the trial judge. The jury heard evidence from the plaintiff and other witnesses tending to indicate Southern's knowledge of Perry's fraud. The plaintiff and other persons clearly testified that Perry came to her home and gave her $500 and that Perry told her that he and "his boss man" had decided to pay her $1500 over a three-month period. Such evidence supports the inference that Perry had communicated his fraud to his superiors, and that this payment scheme was an attempt to "hush" the plaintiff.

In addition, we note that the route lists that were maintained at Southern's corporate offices in Opelika clearly showed that Perry had diverted monies from the "overage" on the Turner/Barrow policy to the Barrow/Banks policy. Yet, when Turner's policy lapsed for failure to pay the premium, Southern provided no notice of lapse to Turner.

Turner testified that she went with Miller Epharim to Southern's regional office on Opelika, Alabama, to inquire about the non-payment of her claim on the "lapsed" policy. She was informed that the policy had lapsed and that no

claim for benefits had ever been filed. Moreover, testimony showed that it was *only after* her inquiry at the Opelika office that Perry told her that he and "his boss man" would pay the plaintiff $500 a month for three months in settlement of her claim. We believe that the jury could reasonably infer from such evidence that Perry was notified of Turner's claim through the Southern office, and that therefore Southern was cognizant of and approved Perry's actions.

The above matters indicate at least a scintilla of evidence showing that Southern personnel had been informed of Perry's fraud and then schemed to conceal it by paying the plaintiff "hush money." It is axiomatic that one may not undo a fraud by subsequent acts. *National State Ins. Co. v. Jones*, 393 So. 2d 1361, 1367 (Ala. 1980).

Thus, for the reasons set out above, the judgment is affirmed.

AFFIRMED.

Shores, Adams, and Kennedy, JJ., concur.

Jones and Houston, JJ., concur in result.

Maddox, J., concurs in part; dissents in part.

Southern Life and Health v. Lucy R. Turner

MADDOX, JUSTICE (concurring in part; dissenting in part).

I concur in that portion of the opinion that affirms the $500,000 award in this case against Perry, but I must point out that I dissented in *Pacific Mutual Life Ins. Co. v. Haslip*, 553 So.2d 537 (Ala. 1989), cert. granted, ___ U.S. ___, ___ S.Ct. ___ (1990), and the principle of law raised in this case is the same as that presented in that case. Therefore, if the Supreme Court of the United States reverses this Court's judgment in that case, then the judgment in this case should also be reversed.

The trial judge gave the following instruction on the award of punitive damages:

> "What about punitive damages? Punitive damages are damages in addition to and above and beyond compensatory damages, which seek to punish a wrongdoer. Sometimes we refer to it as exemplary damages. That is, damages to make an example of the wrongdoer. For the purpose of punishing that wrongdoer for the wrong that he has perpetrated. And secondly, to make an example out of him, and to prevent him or other people similarly situated from doing the same sort of wrong in the future. The amount of punitive damages in any case is left to the sound discretion of the jury. If you are to award punitive damages, you determine the amount that is appropriate in this case. In determining the amount though, you can be guided by three things. The enormity of the wrong, the culpability of the wrongdoer, and the necessity for preventing similar wrongs by this defendant or other people similarly situated in the future. So again, punitive damages are for the purpose of punishment, and making an example of the wrongdoer, so that he or others in the future will not do the same type of misconduct. And in determining the amount, use your sound discretion, keeping in mind three things. The enormity of the wrong, the culpability of the wrongdoer, and the necessity for preventing similar wrongs by that wrongdoer or others similarly situated in the future.
>
> "In a case where fraud is alleged, as in this case, punitive damages can be awarded only when the plaintiff has proved, not only the existence of the legal fraud in question, but another step must be proved. Another item must be proved. Not just that the legal fraud occurred. But, to

> justify punitive damages, the plaintiff must reasonably satisfy you from the evidence which is clear and convincing, that the fraud in question was malicious, oppressive or gross, and committed with the intent to injure the plaintiff. So, before you could award punitive damages, as opposed to compensatory damages, before you could award punitive damages in this case, you would have to be reasonably satisfied from the evidence, and the evidence would have to be clear and convincing on this point. That Richard Perry committed the legal fraud that he is accused of, as I defined that to you. And, you must be reasonably satisfied, and the evidence must be clear and convincing on this, that that fraud was malicious, oppressive or gross, and that it was done with the intent, committed with the intent to injure, financially injure, Lucy Turner. Without such proof, you might be authorized to award compensatory damages in the amount of a thousand dollars, but you would not be authorized to award any punitive damages."

Does the giving of that instruction alone suffice to guarantee to the defendants due process of law? I think not, but I must await, as everyone else must, the decision of the Supreme Court of the United States in *Pacific Mutual Life Ins. Co. v. Haslip*, supra.

I respectfully dissent from that portion of the opinion that affirms the judgment concerning the liability of Southern Life. I am of the opinion that there was no evidence that Southern Life was aware of, or ratified, Perry's acts or that Perry was acting within the line and scope of his employment.

Thus, Southern Life should not be held liable.

APPENDIX B

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

Re: 88-1289

SOUTHERN LIFE & HEALTH INSURANCE CO., *ET AL*
Appellant

vs.

LUCY R. TURNER
Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

_____ Appeal docketed. Future correspondence should refer to the above number.

_____ Court Reporter granted additional time to file reporter's transcript to and including

_____ Clerk/Register granted additional time to file clerk's record/record on appeal to and including

_____ Appell ___ granted 7 additional days to file briefs to and including

_____ Appellant(s) granted 7 additional days to file reply briefs to and including

_____ Record on Appeal filed

_____ Appendix Filed

_____ Submitted on Briefs

_____ Petition for Writ of Certiorari denied. No opinion.

XXXXX Application for rehearing overruled. No opinion written on rehearing. **Hornsby, CJ., Jones, Shores, Adams, Houston and Kennedy, JJ., concur.**

_____ Permission to file amicus curiae briefs granted

/s/ Robert G. Esdale
Robert G. Esdale, Clerk
Supreme Court of Alabama

12/7/90
bsa

APPENDIX C

**IN THE CIRCUIT COURT OF
MACON COUNTY, ALABAMA**

CASE NO. CV-87-90

LUCY R. TURNER,

Plaintiff

vs.

SOUTHERN LIFE & HEALTH INSURANCE COMPANY, *et al*,

Defendants

**FILED IN
CIRCUIT CLERK'S OFFICE
MACON COUNTY, AL
89 MAY 26 AM 9:44
EDDIE D. MALLARD
CIRCUIT CLERK**

HAMMOND ORDER

This case was submitted to a jury, which returned a verdict against the defendants in the amount of $5 million, and judgment was entered by the Court pursuant to said verdict. Thereafter, defendants filed the usual post-trial motions (motions for new trial and for judgment notwithstanding the verdict).

This case was submitted to the jury on one count alleging civil fraud. In that count, it was alleged that defendant Perry accepted insurance premiums from the

plaintiff and converted those premiums to his own use, and concealed that fact from the plaintiff, thereby causing the policy of insurance to lapse and be out of benefit when the insured died. It was alleged that the defendant Southern Life authorized said conduct, or ratified it after it occurred. The jury found against both defendants.

In most civil fraud cases there is a "gray area" as to the commission of the alleged fraud; e.g., the necessity for the jury to intrepret the meaning of the words or conduct of the person accused of the fraud, or to determine whether plaintiff's reliance was reasonable. In this case the factual issue of the commission of the fraud was simple and clear; either defendant Perry did it or he didn't. This presented a simple and unambiguous question of fact for the jury, and the jury found for the plaintiff. Whether defendant Southern Life authorized or ratified its agent's conduct was not so simple a question, but the jury was charged on this point and again decided in favor of plaintiff. While the evidence which would make defendant Southern Life liable was not as clear or as abundant as that implicating the agent, there was nevertheless sufficient evidence to support a verdict against defendant Southern Life.

We next turn to the *Hammond* questions: whether the verdict was influenced by or resulted from bias, corruption, prejudice, emotions or other improper motive, and whether the verdict was excessive. We find that the verdict was excessive based on certain mitigating facts in this case, and that the size of the verdict may have been affected by bias, prejudice or emotions arising out of the alleged prejudicial remarks of one of plaintiff's attorneys addressed to one of defendant's attorneys. In other words, neither the mitigating facts nor any element of bias, prejudice or emotion is sufficient to cause the verdict to be set aside, but each would be sufficient to cause the amount of the verdict to be reduced. Both the mitigating facts

and the prejudicial remarks are discussed below. We find no evidence of corruption or other improper motive.

Addressing the facts of the case, defendant Perry, in effect, stole insurance premiums and caused the policy to lapse. This was a clear-cut, egregious fraud. On the other hand, when confronted with this fraud, defendant Perry paid to plaintiff $500 of the $1,500 death benefit provided by the policy, and agreed to pay the $1,000 balance in monthly installments of $500 each. Plaintiff admits that she believes defendant Perry was sincere and acting in good faith when he made these representations, and that he would have paid the $1,000 balance and that she would have been "made whole" had defendant Perry been allowed time to fulfill his promise (suit was filed before the next installment became due). While this conduct does not excuse the fraud, it serves to mitigate the punitive damages to be awarded on account of the fraud. With respect to defendant Southern Life, suit was filed shortly after it was given notice of plaintiff's complaint, and that fact tends to mitigate defendant Southern Life's culpability. After considering the enormity of the wrong, the culpability of the wrongdoers, and the necessity for preventing similar wrongs in the future, and after taking into consideration the mitigating circumstances mentioned above, the verdict of $5 million is excessive, and is due to be remitted.

As to the prejudicial remarks, defendants argue that the vitriolic outburst of one of plaintiff's attorneys caused the jury to be biased, prejudiced and inflamed to the point that the jury was caused to render a verdict, and indeed a large verdict, against defendants. The Court acknowledges that it was shocked and surprised by the outburst, and the Court concedes that its response to it may not have been as thorough or otherwise appropriate as would have been the case had the Court anticipated it or had time to cogitate over it before making a response. But considering the totality of the trial (the evidence, the con-

duct of the parties and their attorneys and the tone and atmosphere of the trial as a whole), we conclude and find that the aforesaid outburst did not produce such bias, prejudice or passion as would cause the rendition of the verdict against defendants, but that it might well have affected the size of the verdict. If that be true, and assuming it to be true, the verdict should be reduced (and we have already found for another reason that the verdict should be reduced), and in determining the amount of the reduction we have taken into consideration the possibility of any bias, prejudice or emotion which might have been caused by the outburst of plaintiff's attorney, in addition to the mitigating circumstances previously discussed.

For the foregoing reasons, we find that the verdict of the jury should be remitted by $4.5 million.

It is, therefore, Ordered that Defendants' Motion for New Trial and for Judgment Notwithstanding the Verdict are due to be, and they are hereby, DENIED, on condition that the plaintiff accept a remittitur in the amount of $4,500,000 (that is, consent to the entry of judgment in the amount of $500,000 and costs), within thirty (30) days.

Let a copy of this Order be mailed by the Clerk to attorneys of record.

This 24th day of May, 1989.

/s/ James Avary
Circuit Judge

IN THE CIRCUIT COURT OF MACON COUNTY, ALABAMA

CIVIL ACTION NO. CV 87-90

LUCY R. TURNER,

Plaintiff

v.

SOUTHERN LIFE AND HEALTH INSURANCE COMPANY, *et al*

Defendants

AMENDMENT TO MAY 24, 1989 "HAMMOND ORDER"

The defendants, Southern Life and Health Insurance Company and Richard Perry, having filed a Motion for Relief from Judgment noting that a clerical mistake arising from an oversight or omission in the Court's Order of May 24, 1989 by the inadvertent omission of language setting forth the effect of plaintiff's failure to accept the remittitur, the inclusion of which language was the intention of this Court at the time of execution of its Order, and for good cause shown,

IT IS HEREBY ORDERED that defendants' Motion is GRANTED and it is further ORDERED, ADJUDICATED, and DECREED that the Court's "Hammond Order" of May 24, 1989 be and hereby is amended by changing the last full paragraph found on page 4 of its Order to read as follows:

It is, therefore, Ordered that Defendants' Motion for New Trial and for Judgment Notwithstanding the Verdict are due to be and they are hereby, DENIED, on condition that the plaintiff accept a remittitur in the amount of $4,500,000 (that is, consent to the entry of judgment in

the amount of $500,000 and costs), within thirty (30) days, otherwise Defendants' Motion for New Trial is GRANTED.

Let a copy of this Amended Order be mailed by the Clerk to attorneys of record.

This ___ day of June, 1989.

/s/ James Avery
Circuit Judge

APPENDIX D

IN THE CIRCUIT COURT OF MACON COUNTY, ALABAMA

CIVIL ACTION NO. CV 87-90

LUCY R. TURNER,

Plaintiff

v.

SOUTHERN LIFE AND HEALTH INSURANCE COMPANY, *et al*

Defendants

ANSWER OF DEFENDANTS TO AMENDED COMPLAINT

Come the defendants, separately and severally, and for their Answer to the Amended Complaint, and each cause of action therein, separately and severally, say:

* * *

TWELFTH DEFENSE

Defendant avers that any award of punitive damages to plaintiff in this case will be violative of the constitutional safeguards provided to defendant under the Constitution of the State of Alabama.

THIRTEENTH DEFENSE

Defendant avers that any award of punitive damages to plaintiff in this case will be violative of the constitutional safeguards provided to defendant under the Constitution of the United States of America.

FOURTEENTH DEFENSE

Defendant avers that any award of punitive damages to plaintiff in this case will be violative of the constitutional safeguards provided to defendant under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States in that punitive damages are vague and are not rationally related to legitimate government interests.

FIFTEENTH DEFENSE

Defendant avers that any award of punitive damages to plaintiff in this case will be violative of Article I, Section 6 of the Constitution of the State of Alabama which provides that no person shall be deprived of life, liberty, or property except by due process of law, in that punitive damages are vague and are not rationally related to legitimate government interests.

SIXTEENTH DEFENSE

Defendant avers that any award of punitive damages to plaintiff in this case will be violative of the procedural safeguards provided to defendant under the Sixth Amendment to the Constitution of the United States in that punitive damages are penal in nature and consequently, defendant is entitled to the same procedural safeguards accorded to criminal defendants.

SEVENTEENTH DEFENSE

It is violative of the self-incrimination clause of the Fifth Amendment to the Constitution of the United States of America to impose against this defendant punitive damages, which are penal in nature, yet compel defendant to disclose potentially incriminating documents and evidence.

EIGHTEENTH DEFENSE

It is violative of the self-incrimination clause of Article I, Section 6 of the Constitution of the State of Alabama to impose against this defendant punitive damages, which are penal in nature, yet compel defendant to disclose potentially incriminating documents and evidence.

NINETEENTH DEFENSE

It is violative of the rights guaranteed by the Constitution of the United States of America and the Constitution of the State of Alabama to impose punitive damages against this defendant which are penal in nature by requiring a burden of proof on plaintiff which is less than the "beyond a reasonable doubt" burden of proof required in criminal cases.

TWENTIETH DEFENSE

It is discriminatory, a deprivation of due process and a violation of the equal protection rights guaranteed by the Fourteenth Amendment to the Constitution of the United States of America and Article I, Sections 1, 6, and 22 of the Constitution of the State of Alabama to impose punitive damages for the violation of the covenant of good faith and fair dealing *only* in contracts between insurers and insureds and not in *all* contracts in Alabama, since the same covenants of good faith and fair dealing exist not only in insurance contracts but also in *all* contracts in the State of Alabama.

TWENTY-FIRST DEFENSE

Defendant avers that any award of punitive damages to the plaintiff in this case will be violative of Article I, Section 10 of the Constitution of the United States in that it will be a retrospective imposition of punitive damages under a new cause of action first recognized by the

Supreme Court of the State of Alabama in 1981 which was subsequent to the issue of the policy of insurance sued upon in this case.

TWENTY-SECOND DEFENSE

Defendant avers that any award of punitive damages to plaintiff in this case will be violative of the Eighth Amendment to the Constitution of the United States in that said damages would be an excessive fine in violation of the Excessive Fines Clause of the Eighth Amendment to the United States Constitution.

TWENTY-THIRD DEFENSE

Defendant avers that any award of punitive damages to plaintiff in this case will be violative of Article I, Section 15 of the Constitution of Alabama 1901 in that said damages would be an excessive fine.

TWENTY-FOURTH DEFENSE

Defendant avers that any award of punitive damages to the plaintiff in this case will be violative of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States in that it would provide damages to the plaintiff in excess of the amount determined to be appropriate under the formula adopted by the Alabama Legislature in 1981 in Section 27-1-17, *Code of Alabama* 1975, as amended.

/s/ Ollie L. Blan, Jr.
Ollie L. Blan, Jr.

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Ernestine S. Sapp

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APPENDIX E

IN THE CIRCUIT COURT OF MACON COUNTY, ALABAMA

CIVIL ACTION NO. CV 87-90

LUCY R. TURNER,

Plaintiff

v.

SOUTHERN LIFE AND HEALTH INSURANCE COMPANY, and RICHARD PERRY,

Defendants

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR IN THE ALTERNATIVE FOR A NEW TRIAL

Come now defendants, Southern Life and Health Insurance Company and Richard Perry, separately and severally, and move the Court to set aside the verdict of the jury heretofore rendered on, to-wit: December 15, 1988 and the judgment of the Court entered thereon and to enter judgment in favor of these defendants in accordance with their Motion for Directed Verdict, or in the alternative, to grant unto defendants a new trial, and as grounds for said motions, defendants set down and assign the following, separately and severally:

* * *

18. The imposition of punitive damages in this case violates the Constitution of the State of Alabama of 1901.

19. The imposition of punitive damages in this case violates the Constitution of the United States of America.

20. The imposition of punitive damages in this case violates the due process clause of the Fourteenth Amendment to the Constitution of the United States of America.

21. The imposition of punitive damages in this case violates the due process and equal protection rights guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States of America, and Article I, Sections 1, 6, and 22 of the Constitution of the State of Alabama of 1901.

22. The imposition of punitive damages in this case violates the due process clause of the Sixth Amendment to the Constitution of the United States of America.

23. The imposition of punitive damages in this case violates the equal protection rights guaranteed to defendants by Article I, Sections 1, 6, and 22 of the Constitution of the State of Alabama of 1901.

24. The imposition of punitive damages in this case violates the due process clause of Article 1, § 6 of the Constitution of the State of Alabama of 1901.

25. The imposition of punitive damages in this case constitutes cruel and unusual punishment in violation of Article I, Section 15 of the Constitution of the State of Alabama of 1901.

26. The imposition of punitive damages in this case constitutes cruel and unusual punishment in violation of the Constitution of the United States of America.

27. The imposition of punitive damages in this case in the amount of $5,000,000 constitutes punishment tantamount to a criminal fine far in excess of any fine authorized by federal or state statute and the jury was not instructed that they must find these defendants liable for punitive damages beyond a reasonable doubt.

28. It is violative of the rights guaranteed by the Constitution of the United States of America and the Con-

stitution of the State of Alabama of 1901 to impose punitive damages against these defendants which are in the nature of a civil fine and punishment by requiring a burden of proof on plaintiff which is less than the burden of proof required in a criminal case.

29. It is discriminatory and a denial of due process and equal protection rights guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution to impose punitive damages, which are penal in nature, against a civil defendant upon the plaintiff's satisfying a burden of proof which is less than the "beyond a reasonable doubt" burden of proof required in criminal cases.

30. The procedures pursuant to which punitive damages are awarded fail to provide a reasonable limit on the amount of the award against defendant, which thereby violates the Due Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution.

31. The procedures pursuant to which punitive damages are awarded fail to provide specific standards for the amount of the award of punitive damages which thereby violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

32. The procedures pursuant to which punitive damages are awarded result in the imposition of different penalties for the same or similar acts, and thus violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, and Article I, Section 1 of the Constitution of Alabama of 1901.

33. The procedures pursuant to which punitive damages are awarded permit the imposition of punitive damages in excess of the maximum criminal fine for the same or similar conduct, which thereby infringes the Due Process Clause of the Fifth and Fourteenth Amendments and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

34. The procedures pursuant to which punitive damages are awarded permit the imposition of excessive fines in violation of the Eighth Amendment of the United States Constitution.

35. It is violative of the due process clause of Article I, Section 6 of the Constitution of Alabama of 1901 to impose punitive damages, which are penal in nature, upon a civil defendant upon the plaintiff's satisfying a burden or proof less than the "beyond a reasonable doubt" burden of proof required in criminal cases.

36. It is violative of the due process clause of Article I, Section 6 of the Constitution of Alabama of 1901 to impose punitive damages against the defendant because the procedures pursuant to which punitive damages are awarded fail to provide a limit on the amount of the award against these defendants.

37. It is violative of the due process clause of Article I, Section 6 of the Constitution of Alabama of 1901 to impose punitive damages against the defendant because the procedures pursuant to which punitive damages are awarded are unconstitutionally vague.

38. It is violative of the due process clause of Article I, Section 6 of the Constitution of Alabama of 1901 to impose punitive damages against the defendant because the procedures pursuant to which punitive damages are awarded fail to provide specific standards for the amount of the award of punitive damages.

39. It is violative of the due process clause of Article I, Section 6 of the Constitution of Alabama of 1901 to impose punitive damages against the defendant because the award of the punitive damages in this case would constitute a deprivation of property without due process of law.

40. The imposition of punitive damages against these defendants, on the basis of vicarious liability for the con-

duct of others, violates the Fifth, Eighth and Fourteenth Amendments of the United States Constitution.

41. The imposition of punitive damages against these defendants constitutes a deprivation of property without due process of law required under the Fifth and Fourteenth Amendments of the United States Constitution.

42. The imposition of punitive damages against the defendant constitutes the imposition of an excessive fine in violation of Article I, Section 15 of the Constitution of Alabama of 1901.

43. The damages awarded in this case constitute an excessive fine in violation of Article I, Section 15 of the Constitution of Alabama of 1901.

44. The imposition of punitive damages against the defendant violates the prohibition against laws that impair the obligations of contracts in violation of Article I, Section 22 of the Constitution of Alabama of 1901.

45. The damages awarded in this case constitute an excessive fine in violation of the Eighth and Fourteenth Amendments of the United States Constitution.

46. The legal standard under which punitive damages were awarded violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution by failing to give fair warning of the conduct that is subject to punishment.

47. The legal standard under which punitive damages were awarded violates the Eighth and Fourteenth Amendments to the United States Constitution by failing to give fair warning of the conduct that is subject to punishment.

48. The legal standard under which punitive damages were awarded violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution because it is vague.

* * *

/s/ Ollie L. Blan, Jr.
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* * *

APPENDIX F

IN THE SUPREME COURT OF THE STATE OF ALABAMA

CASE NO. 88-1289

SOUTHERN LIFE AND HEALTH INSURANCE COMPANY, and RICHARD PERRY,

Appellants

vs.

LUCY R. TURNER,

Appellee

ON APPEAL FROM THE CIRCUIT COURT OF MACON COUNTY, ALABAMA

BRIEF AND ARGUMENT OF APPELLANTS SOUTHERN LIFE AND HEALTH INSURANCE COMPANY AND RICHARD PERRY

ORAL ARGUMENT REQUESTED

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* * *

EXCESSIVENESS OF PUNITIVE DAMAGES

The trial judge sent this case to the jury with the instruction that the compensatory damages available to the plaintiff was $1000. The jury returned a verdict of $5,000,000 (5000 times $1000) after a deliberation of some 20 to 25 minutes. This short period of deliberation is itself indicative of the bias and prejudice which pervaded the minds of the jury resulting in this outrageous verdict.

The trial judge agreed that this verdict was excessive. He denied defendants' Motion for JNOV/New Trial on condition the plaintiff agree to a remittitur of 4.5 million dollars reducing the verdict to $500,000. (See Court's *Hammond* Order, CR. 742-744)

We take issue with the trial judge's conditional approval and remittitur of the jury's verdict for two reasons: (1) a

remittitur of 90% of a verdict for excessiveness dictates the setting aside of the entire verdict, and (2) $500,000 is excessive under the facts of this case.

The trial judge concluded that the amount of damages was excessive by 90%, but at the same time concluded that this excessiveness did not affect the rendition of a verdict against defendants on liability. There is no way to segregate these two aspects of the case and hold that the jury was wrongfully affected by extraneous factors, but only as to damages, and not wrongfully affected by the same factors, or other factors, as to the issue of liability.

It has been the law in this state for many years, and so far as we know it is still the law, that where the damages awarded are so excessive as to warrant the belief that the jury was misled or had a mistaken view of the merits of the case, the verdict of the jury should be set aside. *National Surety Co. v. Mabry*, 139 Ala. 217, 35 So. 698 (1903). The appropriate rule in a puntive damages case is stated in *Carlisle v. Miller*, 275 Ala. 440, 155 So. 2d 689 (1963):

> Where, as here, there is no set standard for the admeasurement of damages but the damages to be awarded are left to the sound discretion of the jury, a remittitur or a new trial should not be ordered on the ground of excessiveness of the jury's verdict except in those cases where the court can clearly see that the verdict has been reached on account of bias, passion, prejudice, corruption, or other improper motive or cause.

Id. at p. 444. *Yarbrough v. Mallory*, 225 Ala. 579, 144 So. 447 (1932); and *Williams v. Williams*, 283 Ala. 292, 216 So. 2d 181 (1968).

It is the rule and practice of this Court to set aside a verdict of the jury when the great weight of the evidence is so against the verdict as to make the verdict manifestly

unjust. *Gavin v. Henrichs*, 375 So. 2d 1063 (Ala. 1979). If the trial court or this Court is convinced by a preponderance of the evidence that the verdict is wrong and unjust, the verdict should be set aside and the case remanded for another trial. *Tallapoosa River Electric Coop., Inc. v. Burns*, 271 Ala. 435, 124 So. 2d 672 (1960).

In this case the judge found that the jury awarded 90% too much damages because of an improper motive, a failure to consider pertinent mitigating factors and circumstances, or because of the possible bias, prejudice, or emotion which was caused by the improper vitriolic outburst of one of the plaintiff's attorneys.

The fact that the trial judge cut the verdict from $5,000,000 to $500,000 is **prima facie** proof of the unfairness and unjustness of the verdict. *If the verdict is that unreasonable and excessive, it should be set aside, not merely cut to a figure more palatable to the trial judge.*

In the trial court's *Hammond* Order he pointed out the mitigating factors which demonstrated the excessiveness of the damage award. When those factors are considered in light of the fact that the maximum compensatory damage was $1,000, an award of $500,000 is grossly excessive.

There is no reference in the trial court's *Hammond* Order to *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989). One of the factors in *Green* involves a relationship between the amount of punitive damages and the amount of harm that either has been incurred or will likely incur from defendants' conduct. The most harm caused to the plaintiff was determined by the trial judge to be $1,000. She would not have incurred any more damage than the $1,000 since this was the balance of the benefit which she could have expected to obtain under the policy of insurance involved in the suit. We point out also that under the plaintiff's own testimony she believed that Perry would have paid her the balance of $1,000. If she had let him do this she would have had no damage whatsoever. She

made no allegation of mental anguish, pain or suffering, and, of course, offered no proof of such. No other harm can occur from Perry's conduct as described by the plaintiff. At the time of the trial his employment with Southern Life as an agent had been terminated. In *Green* this court stated that if the actual or likely harm is slight, the damages should be relatively small.

Another factor in *Green* deals with the reprehensibility of the defendants' conduct. Considerations here deal with the awareness of the defendants of the hazard which the conduct has caused or is likely to cause, and the existence or frequency of similar past conduct. As we stated previously, there is absolutely no evidence here that the conduct of Perry was intended to cause damage to the plaintiff. Her own testimony concerning his actions in April and May 1987 negated any intent on his part that she suffered harm. On the other hand, there is absolutely no evidence that Southern Life was aware of any hazard to the plaintiff. In fact plaintiff testified that when she met with Southern Life's District Manager in Opelika, she did not tell him that she had been paying premiums for which she had not been receiving credit, did not tell him that Perry had taken her premium receipt books and retained them, and did not tell him of Perry's alleged promise that he and his boss would pay the benefits under the policy. The day after she received the $500 she went to the Insurance Department in Montgomery who stated that they would make an investigation. The very next day she hired an attorney and suit was filed shortly thereafter. Southern Life was not given nor did it have any reasonable opportunity to investigate or become knowledgeable of any so-called misconduct, and, if necessary, to correct any alleged wrongdoing.

With respect to similar past conduct, there is a total lack of evidence that Perry has engaged in any such conduct with respect to any insureds of Southern Life in the

past, nor was there any evidence that Southern Life had engaged in similar past conduct.

Another element in the *Green* case deals with the profitability of the conduct to the defendants. The premiums which plaintiff claimed she paid for which she was not given credit amounted to less than $100. Perry was further penalized for the lapse by a chargeback against his reserve account of $7^1/_2$ times the amount of the premium, a sum in excess of $100 (R. 501, 505). He also allegedly made a payment to her of $500 which meant that he sustained a substantial loss because of his alleged pocketing of premiums. So far as Southern Life is concerned, it actually suffered a loss because it lost all the premiums allegedly collected by Perry and not paid over to the Company.

When these factors from *Green* are considered, along with the totality of the facts and circumstances in this case, the remitted damage award of $500,000 is clearly excessive. We submit that this verdict and judgment should be set aside, and the case remanded for a new trial.

UNCONSTITUTIONALITY OF PUNITIVE DAMAGES

Five Justices of the Supreme Court of the United States have seriously questioned the Constitutionality of state laws which allow awards of punitive damages without sufficient standards to govern the jury in awarding and affixing the amount of punitive damages. *See Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 108 S. Ct. 1645, 1654-56 (1988) (O'Connor, J. and Scalia, J., concurring); *Browning-Ferris Industries of Vermont, Inc. v. Kelko Disposal, Inc.*, ___ U.S. ___, 109 S. Ct. 2909, 2923-24 (1989) (Brennan, J.; Marshall, J.; O'Connor, J.; and Stephens, J.; concurring).

Most recently in *Browning-Ferris*, Justice Brennan stated:

> Without statutory (or at least common-law) standards for the determination of how large an award of punitive damages is appropriate in a given case, juries are left largely to themselves in making this important, and potentially devastating, decision. Indeed, the jury in this case was sent to the jury room with nothing more than the following terse instruction: 'In determining the amount of punitive damages, you may take account of the character of the defendants, their financial standing, and the nature of their acts.' App. 81. *Guidance like this is scarcely better than no guidance at all.* I do not suggest that the instruction itself was in error; indeed, it appears to have been a correct statement of Vermont law. The point is, rather, that the instruction reveals a deeper flaw: the fact that punitive damages are imposed by juries guided by little more than an admonition to do what they think is best.

109 S. Ct. at 2923 (Brennan, J. and Marshall, J., concurring).

Justice O'Connor stated in *Browning-Ferris*:

> [I] share JUSTICE BRENNAN'S view . . . that nothing in the Court's opinion forecloses a due process challenge to awards of punitive damages or the method by which they are imposed, and I adhere to my comments in *Bankers Life* . . . regarding the vagueness and procedural due process problems presented by juries given unbridled discretion to impose punitive damages.

Id. at 2924.

The first U.S. Supreme Court discussion of the possible unconstitutionality of punitive damages was in an Alabama

case, *Aetna Life Insurance Co. v. Lavoie*, 106 S.Ct. 1580 (1986):

> Appellant also argues . . . that a $3.5 million punitive damage award is impermissible under the Excessive Fines Clause of the Eighth Amendment; and that lack of sufficient standards governing punitive damage awards in Alabama violates the Due Process clause of the Fourteenth Amendment. . . . *These arguments raise important issues which, in an appropriate setting, must be resolved; however, our disposition of the recusal-for-bias issue makes it unnecessary to reach them.*

Lavoie, supra, 106 S.Ct at 1589 (emphasis added).

While the Excessive Fines issue has now been resolved, the U.S. Supreme Court, both in *Browning-Ferris* and in *Bankers Life*, held that the Due Process Clause issue was not properly presented for review. The same is true of this Court in other cases.

In this case the impermissibility of punitive damages in Alabama as a violation of the Due Process Clause of the Fourteenth Amendment has been presented in the Answer to the Complaint, by Motion for Directed Verdict, and by Motion for JNOV/New Trial. This issue is properly before this Court. We ask this Court to address it in light of the authority of the U.S. Supreme Court decisions and the guidance of other courts.

In *Juzwin v. Amtorg Trading Corp.*, 705 F.Supp. 1053 (D.N.J. 1989), the court stuck a claim for punitive damages on the ground that multiple exposure to punitive damages for a single course of conduct violated the Due Process Clause of the Fourteenth Amendment. *Id.* at 1060-64.

In another case, the court held that state constitutional guarantees to "full legal redress" did not prohibit the elimination of punitive damages in certain causes of action.

See Meech v. Hillhaven West, Inc., ___ P.2d ___ (Mont. 1989), No. 88-4410, (June 29, 1989) (statutory elimination of punitive damages and noneconomic loss for wrongful termination of employment did not violate state open court/full legal redress constitutional provisions); *Cf. Chiles v. Chiles*, ___ S.W. 2d ___ (Tex. Civ. App. 1989), No. B14-88-00470-CV (July 13, 1989) (tort of intentional infliction of emotional distress and punitive damages not recoverable in divorce proceedings).

Under Alabama law, the jury is only given the following instruction as guidance in fixing the amount of the award, "Should you award punitive damages, in fixing the amount, you must take into consideration the character and degree of the wrong as shown by the evidence in this case, and the necessity of preventing similar wrongs." APJI 11.03. In charging the jury, the trial court substantially followed this pattern instruction. (R. 674,675.)[1]

As Justice Brennan noted in *Browning-Ferris*, "[g]uidance like this is scarcely better than no guidance at all." 109 S. Ct. 2923. As with the Vermont and Mississippi instructions in *Browning-Ferris*[1] and *Bankers Life*, this statement was a correct statement of current state law. *Id.* However, "[t]he point is . . . that the instruction reveals a deeper flaw: the fact that punitive damages are imposed by juries guided by little more than an admonition to do what they think is best." *Id.* The problem is that Alabama "law gives juries discretion to award any amount of punitive damages in any tort case in which a defendant

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[1] The actual charge was, "And in determining the amount, use your sound discretion, keeping in mind three things. The enormity of the wrong, the culpability of the wrong doer, and the necessity for preventing similar wrongs by that wrongdoer or others similarly situated in the future." (R. 674-675)

[1] The trial court in *Browning-Ferris* charged the jury under Vermont law: "In determining the amount of punitive damages, you may take account of the character of the defendants, their financial standing, and the nature of their acts." 109 S. Ct. 2923.

acts with a certain mental state." *Bankers Life*, 108 S. Ct. at 1655 (O'Connor, J., concurring).

While there are post-trial procedures for judicial review of punitive damage awards, those procedures only operate within the context of the heavy presumption in favor of a jury's verdict. The post-trial review is not a fresh, independent review, but one that is largely determined by what the jury has already done and is only to be reversed under exceptional circumstances.

That procedure is fundamentally distinct from one giving instructions with adequate and sufficient standards on punitive damages *before* the jury reaches its verdict. A standardless award of punitive damages violates due process. It allows (1) windfall recoveries which may be both unpredictable and substantial, (2) juries to affix punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused, and (3) punitive damages to be based upon a jury's wholly standardless discretion to determine the severity of punishment.

The substantial verdict in this case is precisely the type verdict which is the product of vague and standardless state laws governing punitive damage awards. The verdict in this case is disproportionate to the actual harm incurred, bears no reasonable relation to the actual harm, and is the product of insufficient standards governing awards of punitive damages.

This award allows punitive damages to be awarded "vicariously" against Southern Life for unauthorized acts of a soliciting agent. The result is unjust, is attributable to lack of sufficient governing standards, is disproportionate to the level of culpability of Southern Life's conduct, is disproportionate to the actual harm, and violates due process.

It is submitted that due process requires objective upper limits on punitive damages awards, either in the form of

a dollar limit or a maximum ratio of punitive damages to actual damages, or both.

Otherwise, such awards will continue to be awarded based upon highly subjective and judgmental factors such as each particular jury's view of the "egregiousness of the defendants conduct," the "enormity of the wrong," the "need of deterrence" and similar factors, which do no more than disguise the actual reasons which caused the particular jury to react punitively to the evidence presented. These reasons were recognized by the California court in *Devlin v. Kearney Mess. AMC/Jeep Renault, Inc.*, 155 Cal. App. 3d 38, 388 (1984), as "depending upon the personality characteristics, individual backgrounds, temperment and societal concerns" of the particular jurors involved.

Therefore, without such objective limits, juries remain free, despite instruction regarding the types of factors referred to above, to punish selectively, to give free reign to bias, prejudice, and emotion, to punish the unorthodox or unpopular and to exact little from others, and to render awards having no necessary relationship to actual harm caused.

Judicial oversight and review does not and cannot cure these defects, because, without objective standards and limits, reviewing courts have no way of determining whether or not the jury in fact adhered to any particular set of criteria.

Judicial review of these awards, under present law, merely transfers discretion to the reviewing courts and further disguises the actual bases for decision.

The evidence points to another Constitutional infirmity under Alabama law: that under the doctrine of respondeat superior, punitive damages may be awarded "vicariously" against the principal without independent wrongful or participatory conduct by the principal. Here, Perry allegedly converted premiums, which was against his written con-

tract, and his training and instructions from Southern Life. Southern Life did not know of his actions at the time, did not authorize his conduct and did not ratify his conduct. Southern Life was punished for conduct it did not commit. As was stated in *McGuffie v. Transworld Drilling Co.*, 625 F. Supp. 369 (W.D. La. 1985):

> ". . . I do not find the policy arguments made [in favor of the Restatement rule] persuasive. Deterrence and punishment have been the traditional policy arguments in favor of imposing punitive damages.
>
> I agree with *McCormick* that 'there would seem to be little justification for punishing the master for willfulness or wantonness of which the agent is alone guilty.' C.T. McCormick, Handbook on the Law of Damages § 80 at 282 (1935). *Also, I seriously question whether the threat of punitive damages would enable the employer to perform the difficult task of predicting or controlling the reckless or malicious conduct of its employees which is generally sporadic.*"

Id. at 373 (emphasis added).

As early as 1893 the Supreme Court of the United States recognized that "vicarious" punitive damages violates due process. *Lake Shore Etc. R. v. Prentice*, 147 U.S. 101 (1893).

Furthermore, the award of punitive damages violates the defendants' rights to procedural due process in that under Alabama law punitive damages were awarded under a lessor standard than beyond a reasonable doubt. Punitive damages are punishment. *See Aetna Life Ins. Co. v. Lavoie*, 470 So. 2d 1060 (Ala. 1985); *Badgett v. McDonald*, 304 So. 2d 228 (Ala. Civ. App. 1974). Alabama law says they may be awarded to punish a party. A verdict of $5 million is severe punishment. If punishment of this severity is to be

meted out, then fundamental fairness requires that the case for punitive damages be solidly proved.

This verdict was not even decided under a preponderance of the evidence standard. Rather, under Alabama law, a jury is instructed it only need be reasonably satisfied from the evidence to award punitive damages. The award is defective because a stronger burden of proof is required for punishment of this magnitude. The Alabama law on the burden of proof violates defendants' right to due process of law.

Defendants also assert before this Court the other constitutional safeguards and defenses set forth in Defendants' Answer to the Complaint and raised in the Motion for Directed Verdict, and the Motion for JNOV/New Trial.

Respectfully submitted,

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APPENDIX G

IN THE SUPREME COURT OF THE STATE OF ALABAMA

CASE NO. 88-1289

SOUTHERN LIFE AND HEALTH INSURANCE COMPANY, and RICHARD PERRY,

Appellants

vs.

LUCY R. TURNER,

Appellee

APPLICATION FOR REHEARING AND BRIEF IN SUPPORT OF APPLICATION FOR REHEARING

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IN THE SUPREME COURT OF ALABAMA

CASE NO. 88-1289

SOUTHERN LIFE AND HEALTH INSURANCE COMPANY, *et al*

Appellants

v.

LUCY R. TURNER,

Appellee

APPLICATION FOR REHEARING

Come now appellants Southern Life and Health Insurance Company and Richard Perry pursuant to ARAP 40 and apply for a rehearing of this appeal on the following grounds:

* * *

8. This Court has failed to discuss and decide other issues raised in this appeal including the improper acts and conduct of the attorney for the plaintiff; the excessiveness of the damages; the fact that a remittitur of the verdict from $5,000,000 to $500,000 is indicative of bias, passion, prejudice, corruption or other improper motive or cause; the fact that the trial court's finding of bias and prejudice of the jury against the defendants with respect to damages cannot be separated from bias and prejudice of the jury with respect to liability; and the unconstitutionality of punitive damages because of a violation of due process against these defendants.

9. The award of $5,000,000 in punitive damages in this case (5000 times the compensatory damages) is unconstitutional under the due process clause of the Fifth and

Fourteenth Amendments to the Constitution of the United States because Alabama law does not provide sufficient objective standards to govern the jury in both awarding punitive damages and affixing the amount of the award.

10. A standardless award of punitive damages violates due process as it allows (1) windfall recoveries which may be both unpredictable and substantial, (2) juries to affix punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused, and (3) punitive damages to be based upon a jury's wholly standardless discretion to determine the severity of punishment.

11. The substantial verdict in this case is precisely the type verdict which is the product of vague and standardless state laws governing punitive damage awards. The verdict in this case is disproportionate to the actual harm incurred, bears no reasonable relation to the actual harm, and is the product of insufficient standards governing awards of punitive damages. This award allows punitive damages to be awarded "vicariously" against Southern Life for unauthorized acts of a soliciting agent who was acting in violation of the Company's instructions, both written and oral, and for his own personal ends. The result is unjust, is attributable to lack of sufficient governing standards, is disproportionate to the level of culpability of Southern Life's conduct, is disproportionate to the actual harm and violates due process.

* * *

/s/ Ollie L. Blan Jr.
Ollie L. Blan, Jr.

Attorney for Appellants
Southern Life and Health
Insurance Company and
Richard Perry

APPENDIX H

ORAL CHARGE

[1] At this time ladies and gentlemen, I will give you what is known as the charge on the law, that is, my instruction to you as to what the law is, as it applies to this case.

* * *

[6] We have two types of damages in Alabama. One is what we call, compensatory, and the other is what we call, punitive.

Compensatory damages are money damages, which seek to put a person in the same condition that he or she would have been in, had he or she not been injured. They are just money damages to compensate one for ones loss.

And, if you have been reasonably satisfied that Mrs. Turner is entitled to recover damages, she's proved her case against Mr. Perry, she would then be entitled to recover compensatory damages. To put her in the same position she would have been had [7] she not been defrauded. And, the amount of those damages in this instance, would be one thousand dollars. Because, by her own testimony, she's already received five hundred dollars. So, the most she could claim as compensatory damages, would be the additional one thousand dollars.

What about punitive damages? Punitive damages, are damages in addition to, and above and beyond compensatory damages, which seek to punish a wrongdoer. Sometimes we refer to it as exemplary damages. That is, damages to make an example of the wrongdoer. For the purpose of punishing that wrongdoer for the wrong that he has perpetrated. And, secondly, to make an example out of him, and to prevent him or other people similarily situated from doing the same sort of wrong in the future. The amount of punitive damages in any case, is left to the sound discretion of the jury. If you are to award pu-

nitive damages, you determine the amount that is appropriate in this case. In determining the amount though, you can be guided by three things. The enormity of the wrong, the culpability of the wrongdoer, and the necessity for preventing similar wrongs, by this defendant or other people similarily situated in the future. So, again, punitive damages are for the purpose of punishment, and making an example of the wrongdoer, so that he or others in the future will not do the same type of misconduct. And, in determining the amount, use your sound discretion, keeping in mind three things. The enormity of the wrong, the culpability of the [8] wrongdoer, and the necessity for preventing similar wrongs by that wrongdoer or others similarily situated in the future.

In a case, where fraud is alleged, as in this case, punitive damages can be awarded only, when the plaintiff has proved, not only the existence of the legal fraud in question, but another step must be proved. Another item must be proved. Not just that the legal fraud occured. But, to justify punitive damages, the plaintiff must reasonably satisfy you from the evidence which is clear and convincing, that the fraud in question, was malicious, oppresive or gross, and committed with the intent to injure the plaintiff. So, before you could award punitive damages, as opposed to compensatory damages, before you could award punitive damages in this case, you would have to be reasonably satisfied from the evidence, and the evidence would have to be clear and convincing on this point. That, Richard Perry committed the legal fraud that he is accused of, as I defined that to you. And, you must be reasonably satisfied, and the evidence must be clear and convincing on this, that, that fraud was malicious, oppresive or gross, and that it was done with the intent, committed with the intent to injure, financially injure, Lucy Turner. Without such proof, you might be authorized to award compensatory damages in the amount of a thousand dollars, but

you would not be authorized to award any punitive damages.

* * *